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SUPREME COURT, U.S.

No. 06-1707

IN THE

Supreme Court of the United States

SEPHORA K. DAVIS,

Petitioner,

v.

HON. JOAN S. KOHOUT and THOMAS E. MORAN, ESQ.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR SUMMARY DISPOSITION AND OTHER RELIEF

SUPPLEMENTAL

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MOTION

Petitioner, through undersigned counsel, pursuant to Rule 21 of this Court, hereby moves in the alternative for a Summary Disposition granting the Petition, and further granting to the Petitioner the following relief:

1. Ordering the Respondents, and each of them, to bring the Petitioner before the Livingston County Court in the Village of Geneseo, New York, order her immediate release from state custody, vacate her judgment of conviction, sentence and plea, and dismiss Livingston County Indictment 2004-276; and

2. Reversing the Order of the New York Court of Appeals under 4 Motion No. 194 dated March 27th, 2007, and reinstating Petitioner's Petition under New York Civil Practice Law and Rules Article 78 in the Nature of Prohibition; and

3. Remanding to the New York State Supreme Court, Appellate Division, Fourth Department, for further proceedings in accordance with New York State law, including the question of whether the Petitioner is entitled to money damages under New York Civil Practice Law and Rules section 7806.

ARGUMENT

Petitioner's Petition for Certiorari was docketed in this Court on June 27, 2007. On July 10th and 11th, 2007, Respondents filed waivers of their respective rights to respond to the Petition, and no timely response was in fact filed by either Respondent. Under Rule 15(2), the facts as related by the Petition in the statement of the case and the procedural history, complete with the many instances of police and prosecutorial misconduct, are therefore conceded.

Conscience shocking misconduct by state law enforcement officials has caused federal courts, including

this one, considerable consternation over many years in a variety of contexts. Albright v. Oliver, 510 US 266 (1994), the decision this Petition seeks to revisit, was an action under 42 U.S.C. 1983 involving a criminal prosecution based upon the scanty evidence of a notoriously unreliable police informant. It produced a plurality opinion from this Court which has generated confusion in the lower courts.

Far more odious, and yet surprisingly difficult of adjudication, was the case of United States v. Lanier, 520 US 259 (1997). Lanier was a state court judge from Tennessee who forced himself sexually upon women in his chambers, one of whom was a potential litigant before his very court, with all the attendant implications of adverse outcomes in the event his misconduct was exposed. He was convicted in District Court in a federal prosecution under 18 U.S.C. 242 (violating constitutional rights). His convictions were at first upheld by the 6th Circuit, but upon review *en banc* his convictions were overturned over several impassioned dissents (73 F.3d 1380), on the ground that his misconduct did not deprive his victims of "due process". This Court granted certiorari, reversed and remanded, whereupon the 6th Circuit ordered Lanier to surrender himself to federal custody. 120 F.3d 640 Incredibly, Lanier failed to surrender and fled to Mexico under an assumed name, and his appeal was dismissed. 123 F.3d 945

In overturning Lanier's convictions in the first instance, the 6th Circuit *en banc* panel was guided by this Court's decision in Screws v. United States, 325 US 91 (1945) Again a plurality opinion like Albright, Screws was a case under what is now 18 U.S.C. 241 and 242 and involved a group of Georgia law enforcement officers who beat an African-American man to death after arresting him - probably falsely - for stealing a tire. The problem complicating Screws was the proffered defense - characterized by concurring Justice Rutledge as "not pretty"

- that the conduct of Screws and his cohorts amounted to murder under state law, not the deprivation of a due process right cognizable in the federal prosecution.

The common thread between Screws, Lanier, and Albright has been the confusion over just what, if anything - beyond a trial - is the "process due" a litigant. And this Court has been reluctant to address this confusion for fear of adding to it by delving into murky areas such as "substantive due process". Even in Lanier, Justice Souter's opinion barely hinted that obviously repugnant conduct by state welfare officials, such as selling children into slavery, would amount to a violation of due process.[1]

But surely this Court's reticence is not meant to embrace the idea that state law enforcement officials are therefore free to fabricate and perjure their way to indictments and convictions - as has admittedly occurred in the case at bar - even where the officials' scheme, which included the victim's forcible rape, is uncovered, placed in issue and conceded *before* trial and sentencing. How can a "trial" of the victim, at that point, be rationally described as "due process"?

And this is not an isolated case: apparently, there is a shameless nationwide subculture within law enforcement. For example, in United States v. Melendez (unreported, other than 2004 U.S. Dist. LEXIS 620), Hon. Avern Cohn, a very respected and experienced Judge of the U.S. District Court for the Eastern District of Michigan, presided over the case of eighteen Detroit police officers prosecuted by the federal government for violating, again, 18 USC 241 and 242 . The federal indictment alleged that the officers

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[1] Justice Souter also cited Williams v. United States, 341 US 97 (1951), an opinion by Justice Douglas holding that police beating a confession out of a suspect obviously violates due process. Yet four Justices dissented, three of them citing the Court's previous decision in Screws.

had committed such acts as "...falsifying police reports and committing perjury to cover up illegal actions, planting evidence, and intimidating individuals who were illegally detained with threats of violence or unlawful arrest."

The officers moved to dismiss the indictment because, *inter alia*, "...there is no pre-existing law indicating that the use of false or fraudulent evidence in a criminal prosecution violates the Due Process Clause of the Fourteenth Amendment...". The officers cited in support of this proposition this Court's decision in Albright v. Oliver, 510 US 266 (1994), the very decision this appeal asks the Court to revisit.

With considerable difficulty, Judge Cohn denied the motion[2], relying on Circuit Court decisions such as Devereaux v. Abbey, 263 F.3d 1070, 1075(9th Cir., 2001)("There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, we are not aware of any prior cases that have expressly recognized this specific right, but that does not mean there is no such right.")

The Court may be chagrined that its thoughtful consideration of the issue posed in Albright would be exploited by corrupt police officers as it was before Judge Cohn in Melendez. Similarly, in the case at bar the Court may believe it unnecessary, or even embarrassing, to prominently wrestle upon plenary review with the question of whether police, prosecutors and their agents - such as informants - can, consistent with the requirements of due process, rape a young woman at knife point, then

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[2] A recent phone call to Judge Cohn revealed that after the officers' motions to dismiss were denied, some of the eighteen were put on trial - but acquitted, a common result in federal criminal cases only where law enforcement officers are the defendants.

successfully terrorize her with threats of physical harm and lengthy imprisonment through the corrupt abuse of a state's criminal justice system. The question, in other words, may answer itself.

Nevertheless, Petitioner submits that the above described sad history of egregious misconduct by state law enforcement officials calls upon this Court to act in this instance - if not upon plenary review, then at least summarily.

Action by this Court is further supported because, in the case at bar, the Petitioner has been respectful of the principles of federalism which have often made these questions so difficult: she presented her arguments in the state trial court; in the state intermediate appellate court upon collateral review; and before the state's highest court. This Court should not now despise her anguished and careful effort to properly frame and present these important questions to this Court, leave her unjustly imprisoned and return her to those same state courts for an uncertain, lengthy and expensive appeal "process", which cannot at this point be any less constitutionally infirm than the process that has brought her here in the first place.

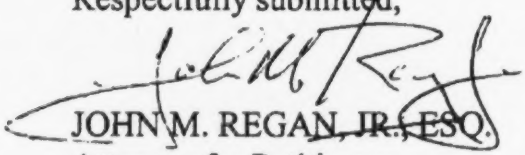
This Court's decision in Lanier provides a sound basis for summary disposition. Lanier held that a constitutional due process right can be clearly established by decisional law from the circuit courts, not just this Court. As noted by Judge Cohn in Melendez, at least five different circuit courts have concluded that violations of due process against a criminal defendant can occur prior to trial. United States v. McDermott, 918 F.2d 319 (2nd Cir., 1990); Geter v. Fortenberry, 849 F.2d 1550 (5th Cir., 1988); United States v. Epley, 52 F.3d 571 (6th Cir., 1995); Anthony v. Baker, 767 F.2d 657 (10th Cir., 1985); Devereaux v. Abbey, 263 F.3d 1070 (9th Cir., 2001) Thus, even if the Court should not wish to use the case at bar to re-examine the issue in Albright it can, based upon the

foregoing caselaw from the circuits, render a summary disposition in Petitioner's favor.

The Court should further direct that the Appellate Division, Fourth Department, upon remand, consider the question of whether Petitioner is entitled to money damages "incidental to the primary relief sought" in accordance with New York Civil Practice Law and Rules section 7806, a purely state law issue which this Court cannot address.

Dated: September 12, 2007

Respectfully submitted,



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